



02-01-06

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HW

Attorney Docket No. 061300-0242

## IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicants: O'Connell, et al.

Title: ENVIRONMENTAL  
SHIELD FOR A TRUCK  
MOUNTED CONCRETE  
MIXER

Application No.: 09/954,677

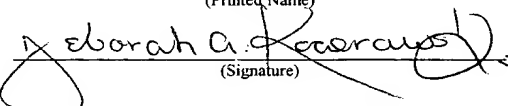
Filing Date: 09/15/2001

Patent No.: 6,957,908

Issue Date: 10/25/2005

Examiner: Cooley, Charles E.

Art Unit: 1723

CERTIFICATE OF EXPRESS MAILING	
I hereby certify that this correspondence is being deposited with the United States Postal Service's "Express Mail Post Office To Addressee" service under 37 C.F.R. § 1.10 on the date indicated below and is addressed to: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.	
EV 625659515 US (Express Mail Label Number)	January 31, 2006 (Date of Deposit)
Deborah A. Kocorowski (Printed Name)	
 (Signature)	

Mail Stop PETITION  
Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

**SECOND REQUEST FOR RECONSIDERATION OF PREVIOUS  
APPLICATION FOR RECONSIDERATION OF PATENT TERM ADJUSTMENT  
UNDER 37 C.F.R. § 1.705(b)**

**IN THE ALTERNATIVE:**

**PETITION FOR SUSPENSION OF RULES UNDER 37 C.F.R. § 1.183**

The Applicants hereby request reconsideration of the Decision On Application For Patent Term Adjustment dated December 2, 2005 (copy provided as Exhibit E), which dismissed the Applicants' Application For Reconsideration of Patent Term Adjustment for the above-identified patent application (copy provided as Exhibit B).

02/02/2006 LWONDI1 00000014 061447 09954677  
01 FC:1462 270.00 DA 130.00 DP

In the alternative, in the event that the Request for Reconsideration is dismissed, the Applicants hereby Petition For Suspension of Rules Under 37 C.F.R. § 1.183 and respectfully submit that denial of the Applicants' patent term adjustment of 643 days in U.S. Patent No. 6,957,908 is an extraordinary situation in which justice requires a waiver of regulations under 37 C.F.R. § 1.704.

## **I. BACKGROUND**

1. The Applicants have previously paid the fee of \$200.00 as set forth in 37 C.F.R. § 1.18(e) in the Applicants original Application For Reconsideration of Patent Term Adjustment, which was filed with the Issue Fee on June 30, 2005.

2. The Applicants were issued a Notice of Allowance (NOA) on March 30, 2005, which indicated that the Patent Term Adjustment (PTA) for the above-identified patent application is 0 day(s). According to the Patent Application Information Retrieval (PAIR) System, the prosecution history of the above-identified patent application includes a 643 day USPTO delay and an 835 day Applicant delay (a copy of the PAIR PTA determination is provided as Exhibit C).

### **The Original Application For Patent Term Adjustment**

1. The Applicants believe that the correct PTA for the above-identified patent application is 643 days.

2. PTA Determination:

(a) USPTO Delay: The PAIR System indicates that a 643 day USPTO delay exists for the time period from the date 14 months after filing of the application (i.e. November 15, 2002) to the date the non-final Office action was mailed (i.e. August 19, 2004).

(b) Applicant Delay: The PAIR System indicates an Applicant delay of 835 days. A Notice to File Missing Parts was mailed on October 16, 2001, but was not received by the Applicants. The USPTO issued a Notice of Abandonment (which the PTO later indicated to be in error – See Exhibit D) on November 10, 2003. The Applicants timely responded to the Notice of Abandonment by filing a Petition to Revive on January 9, 2004. The Petition was granted on April 30, 2004.

The USPTO issued a Withdrawal of Previously Sent Notice on July 29, 2004, indicating that the Notice of Abandonment mailed on November 10, 2003, was sent in error.<sup>1</sup> The delay assessed to the Applicants is entirely attributable to the period of time associated with rectifying the erroneous Notice of Abandonment received from the Office.

(c) PTA Calculation: As such, the Applicants contend that the USPTO delay is 643 days and that the Applicant delay is 0 days. Therefore, the above-identified patent application is entitled to a 643 day PTA.

(d) Terminal Disclaimer: The above-identified patent application is not subject to a terminal disclaimer.

(e) Circumstances That Constitute a Failure to Engage in Reasonable Efforts to Conclude Processing or Examination:

The Applicants believe that there were no circumstances constituting a failure to engage in reasonable efforts to conclude processing or examination of the above-identified patent application as set forth in 37 C.F.R. § 1.704.

#### **The Decision On the Original Application For Patent Term Adjustment**

A Decision On Application For Patent Term Adjustment mailed on September 1, 2005 states that the “application for patent term adjustment is DISMISSED” (see Exhibit A). The Decision also stated:

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<sup>1</sup> The Applicants have included a copy as Exhibit D.

A review of the record reveals that Applicants were properly assessed applicant delay pursuant to 37 C.F.R. § 1.704(c)(3). A Notice to File Missing Parts was mailed on October 16, 2001. Applicants failed to timely reply. Accordingly, the application became abandoned on December 17, 2001. A petition to revive was first filed on January 9, 2004, and was finally granted in a decision mailed on April 30, 2004.

Applicants state that the Office mailed a Withdrawal of Previously Sent Notice on July 29, 2004, indicating that the Notice of Abandonment mailed on November 10, 2003 was mailed in error. However, a review of the application file fails to reveal the presence of that paper. The application file is the official file of record. An applicant alleging the presence of a paper not contained therein bears the weight of that allegation by a preponderance of the evidence. (Emphasis added).

**Applicants Request for Reconsideration of Application for Reconsideration of Patent Term Adjustment Under 37 C.F.R. § 1.705(b)**

The Applicants submitted a copy of the Withdrawal of Previously Sent Notice mailed by the Office on July 29, 2004 and received by the Applicants on August 2, 2004, which states "The Notice of Abandonment mailed in 11/10/2003 was sent in error and is hereby withdrawn. A Filing Receipt is enclosed. The Office regrets any inconvenience the error may have caused" (see Exhibit D).

The Applicants respectfully submit that the entire delay assessed to the Applicants for the period from December 17, 2001 (the date the application became abandoned) to April 30, 2004 (the date of mailing of the decision reviving the application) of 865 days was not due to any delay or failure to engage in reasonable efforts to conclude prosecution by the Applicants. The Applicants did not receive the Notice to File Missing Parts dated October 16, 2001 and respectfully submit that the entire delay of 865 days was due to the Notice of Abandonment, and that the Applicants acted diligently to rectify the erroneous Notice of Abandonment.

In response to the Notice of Abandonment, the Applicants filed a Petition for Revival of Application for Patent Abandoned Unintentionally Under 37 C.F.R. § 1.137(b), rather than a petition to withdraw the holding of abandonment under 37 C.F.R. § 1.181(a).

**The Decision on Applicants Request for Reconsideration**

A Decision On Application For Patent Term Adjustment mailed on December 2, 2005 states that the “application for patent term adjustment is DISMISSED” (the “Dismissal” – see Exhibit E). The Dismissal also stated:

Rather than file a petition to withdraw the holding of abandonment due to non-receipt of the Notice to File Missing Parts, applicants filed a petition to revive the application under 37 C.F.R. § 1.137(b) on January 9, 2004. The petition was granted in a decision mailed on April 30, 2004. The decision revived the application under 37 C.F.R. § 1.137(b); it did not *sua sponte* withdraw the holding of abandonment.

In footnote 2, the Dismissal also stated:

A petition to revive an abandoned application should not be confused with a petition to withdraw the holding of abandonment. Where an applicant contends that the application is not in fact abandoned (e.g. , there is disagreement as to the sufficiency of the reply, controlling dates, or applicant contends he did not receive an Office action), a petition under 37 CFR 1.181(a) requesting withdrawal of the holding of abandonment is the appropriate course of action, and such petition does not require a fee. Where there is no dispute as to whether an application is abandoned (e.g. the applicant’s contentions merely involve the cause of abandonment), a petition under 37 CFR 1.137 is necessary to revive the abandoned application.

The Dismissal then recites 37 C.F.R. § 1.704(c)(3) which states (in part):

Circumstances that constitute a failure of the applicant to engage in reasonable efforts to conclude processing or examination of an application also include ... abandonment of the application ... in which case the period of adjustment set forth in §1.703 shall be reduced by the number of days, if any, beginning on the date of abandonment ... and ending on ... the date of mailing of the decision reviving the application.

**II. SECOND REQUEST FOR RECONSIDERATION OF PREVIOUS APPLICATION FOR RECONSIDERATION OF PATENT TERM ADJUSTMENT**

The Applicants hereby submit this Second Request for Reconsideration of Previous Application for Reconsideration of Patent Term Adjustment.

The Applicants respectfully point out that 37 C.F.R. § 1.181 “Petitions to the Commissioner” is directed to petitions in general and does not specifically identify a “petition to withdraw the holding of abandonment.”

The Applicants acknowledge the distinction between a “petition to revive an abandoned application” and a “petition to withdraw a holding of abandonment” as stated in the Decision dated December 2, 2005, and as also outlined in M.P.E.P. § 711.03(c)(I).

However, the Applicants also respectfully direct the Commissioner’s attention to M.P.E.P. § 711.03(c)(II) “Petition to Withdraw Holding of Abandonment Based on Failure to Receive Office Action” which states:

Two additional procedures are available for reviving an application that has become abandoned due to failure to reply to an Office Action: (1) a petition under 37 CFR 1.137(a) based on unavoidable delay; and (2) a petition under 37 CFR 1.137(b) based on unintentional delay.

The Applicants respectfully submit that the 37 C.F.R. § 1.181 does not specifically identify a “petition to revive an abandoned application,” and that M.P.E.P. § 711.03(c)(II) recognizes either a “petition to revive an abandoned application” or a “petition to withdraw a holding of abandonment” as an effective method of overcoming abandonment of an application when an Office Action is not received by the Applicant.

Regardless which form of petition is used, as expressly permitted under M.P.E.P. § 711.03(c), the basis for overcoming abandonment was the fact that the Notice of Missing Parts was not received by the Applicants. Failure to receive an Office Action is an acceptable basis for overcoming abandonment (by “withdrawal” and/or “revival”) of the application as provided in the M.P.E.P.

The Applicants consulted with Mr. Preston Wallace of the USPTO on November 13, 2003 to explain and discuss this matter, and Mr. Wallace suggested that the Applicants file a petition to revive an abandoned application (see the Declaration of Mr. James A. Wilke filed with the Petition to Revive the Application under 37 C.F.R. § 1.137(b) on January 9, 2004 – provided as Exhibit F).

The Applicants filed a petition to revive the application under 37 C.F.R. § 1.137(b) on January 9, 2004 as suggested by Mr. Preston, and as permitted in M.P.E.P. § 711.03(c)(II). The petition was granted in a decision mailed on April 30, 2004.

The Applicants respectfully submit that under either form of petition, the justification for overcoming the abandonment of the application was the same (i.e. failure to receive the Notice of Missing Parts), and that the Applicants responded in a timely manner, using a form of petition that was consistent with the guidance of the PTO representative, and the regulations (which do not specifically identify a “petition to withdraw a holding of abandonment”), and the applicable portion of the M.P.E.P. (which permits either form of petition for overcoming abandonment in the case of failure to receive an Office Action).

In the event that the Commissioner maintains the Dismissal of the Applicants’ request for reconsideration on the basis of the distinction between the forms of petitions (i.e. “petition to revive an abandoned application” and a “petition to withdraw a holding of abandonment”), then the Applicants respectfully request that the Commissioner treat the Petition to Revive the Application under 37 C.F.R. § 1.137(b) filed on January 9, 2004 as a “petition to withdraw a holding of abandonment” under 37 C.F.R. § 1.181.

Accordingly, the Applicants respectfully request reconsideration of the Dismissal dated December 2, 2005, and that the Application for patent term adjustment of 643 days filed on June 24, 2005 be granted.

**III. PETITION FOR SUSPENSION OF RULES UNDER 37 C.F.R. § 1.183**

In the event that the Applicants' Second Request for Reconsideration is dismissed, the Applicants hereby petition for suspension of rules under 37 C.F.R. § 1.183 and request that the Commissioner reverse the Dismissal dated December 2, 2005 and grant the Applicants request for patent term adjustment of 643 days.

**Grounds for Petition**

As grounds for the petition, the Applicants respectfully submit that:

1. The circumstances that form the basis for the petition are as previously outlined above in the Applicants' requests for reconsideration of patent term adjustment.
2. The Applicants have enclosed herewith the fee of \$130.00 as set forth in 37 C.F.R. § 1.17(h) for a Petition For Suspension of Rules under 37 C.F.R. § 1.183.
3. The circumstances constitute an extraordinary situation where justice requires that the Commissioner suspend or waive the requirement under 37 C.F.R. § 1.704(c)(3) to reduce the period of patent term adjustment related to abandonment, because of an apparent distinction in 37 C.F.R. § 1.704(c)(3) between an abandoned application that was "revived," and an abandoned application whose holding of abandonment was "withdrawn" (which is not a requirement of the 35 U.S.C. § 154).
4. A failure to suspend or waive the requirements under 37 C.F.R. § 1.704(c) will unjustly preclude the '908 patent from attaining its full term by a period of 643 days, after the Applicants had overcome a prior abandonment of the application using a form of petition (i.e. revival of abandoned application) that was consistent with the guidance of a PTO representative, and the regulations, and an applicable portion of the M.P.E.P. In addition, the Applicants acted in good faith to overcome the abandonment, including payment of a \$1330 fee associated with the petition to revive.



5. The Petition to Revive the Application under 37 C.F.R. § 1.137(b) filed on January 9, 2004 may also be effectively considered by the Commissioner as a “petition to withdraw a holding of abandonment.” In their Petition to Revive the Application under 37 C.F.R. § 1.137(b) filed on January 9, 2004, the Applicants provided evidence that the Notice to File Missing Parts was not received (see Exhibit F). Such evidence would also support a petition to withdraw a holding of abandonment due to failure to receive the Notice of Missing Parts.

6. Denial of the patent term adjustment of 643 days would be inherently unfair and unjust because the Applicants acted diligently and in good faith at all times to resolve abandonment of the application and conclude prosecution of the application.

### **Conclusion**

Upon receiving the Notice of Abandonment (because the Notice to File Missing Parts was not received by the Applicants), the Applicants’ solicited the advice of the PTO and consulted the regulations and the M.P.E.P. to determine the correct form of response. The Applicants’ diligently responded by filing a petition to revive the abandoned application that included evidence that the Notice to File Missing Parts was not received. Such evidence is relevant to “revive” the application, or “withdraw” a holding of abandonment. The Applicants had filed the petition to revive in good faith and along with payment of the \$1330 fee associated with a petition to revive under 37 C.F.R. § 1.137.

Dismissal of the Applicants’ request for reconsideration of patent term adjustment in the amount of 643 days, because the petition filed by the Applicants was in the form of a “revival” rather than a “withdrawal,” would be unfair and unjust under the circumstances and represents an extraordinary situation where a waiver or suspension of 37 C.F.R. § 1.704(c)(3) is proper.

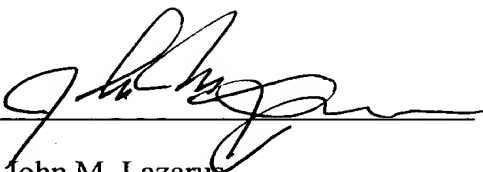
As such, the Applicants respectfully request reversal of the Dismissal, and that the Commissioner grant the Applicants’ request for patent term extension in the amount of 643 days.

Should any questions arise with regard to this Second Request for Reconsideration, and in the alternative, Petition for Suspension of Rules, please contact the undersigned.

Respectfully submitted,

Date 1/31/2006

FOLEY & LARDNER LLP  
Customer Number: 26371  
Telephone: (414) 297-5591  
Facsimile: (414) 297-4900

By 

John M. Lazarus  
Attorney for the Applicants  
Registration No. 48,367



Attorney Docket No. 061300-0242

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicants: O'Connell, et al.  
Title: ENVIRONMENTAL  
SHIELD FOR A TRUCK  
MOUNTED CONCRETE  
MIXER

Application No.: 09/954,677

Filing Date: 09/15/2001

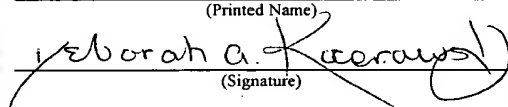
Patent No.: 6,957,908

Issue Date: 10/25/2005

Examiner: Cooley, Charles E.

Art Unit: 1723

Mail Stop **PETITION**  
Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

<b>CERTIFICATE OF EXPRESS MAILING</b>	
I hereby certify that this correspondence is being deposited with the United States Postal Service's "Express Mail Post Office To Addressee" service under 37 C.F.R. § 1.10 on the date indicated below and is addressed to: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.	
EV 625659515 US (Express Mail Label Number)	January 31, 2006 (Date of Deposit)
Deborah A. Kocorowski (Printed Name)	
 (Signature)	

**TRANSMITTAL**

Transmitted herewith please find the following documents for the above-identified patent application.

- [ X ] Second Request for Reconsideration of Previous Application for Reconsideration of Patent Term Adjustment Under 37 C.F.R. § 1.705(b)

In the Alternative: Petition for Suspension of Rules Under 37 C.F.R. § 1.183 (10 pages).

- [ X ] Exhibit A (3 pages).  
[ X ] Exhibit B (6 pages).  
[ X ] Exhibit C (2 pages).  
[ X ] Exhibit D (3 pages).  
[ X ] Exhibit E (5 pages).

[ X ] Exhibit F (6 pages).

A credit card payment form in the amount of \$130.00 is enclosed.

The Commissioner is hereby authorized to charge any additional fees which may be required regarding this application under 37 C.F.R. §§ 1.16-1.17, or credit any overpayment, to Deposit Account No. 06-1447. Should no proper payment be enclosed herewith, as by the credit card payment form being unsigned, providing incorrect information resulting in a rejected credit card transaction, or even entirely missing, the Commissioner is authorized to charge the unpaid amount to Deposit Account No. 06-1447.

Please direct all correspondence to the undersigned attorney or agent at the address indicated below.

Respectfully submitted,

Date 1/31/2006

By 

FOLEY & LARDNER LLP  
Customer Number: 26371  
Telephone: (414) 297-5591  
Facsimile: (414) 297-4900

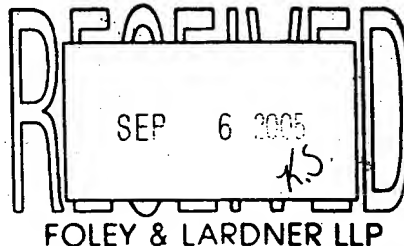
John M. Lazarus  
Attorney for the Applicants  
Registration No. 48,367



UNITED STATES PATENT AND TRADEMARK OFFICE



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SUITE 3800  
MILWAUKEE WI 53202-5308

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**SEP 01 2005**

**OFFICE OF PETITIONS**

In re  
O'Connell, et al.  
Application No. 09/954,677  
Filed: September 15, 2001  
Attorney Docket No. 061300-0242

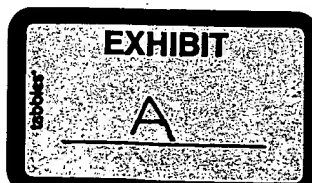
: DECISION ON APPLICATION  
: FOR PATENT TERM ADJUSTMENT  
:  
:

(REQ. FOR RECONSIDERATION)  
RESPONSE DUE 11/1/05

This letter is in response to the "APPLICATION FOR RECONSIDERATION OF PATENT TERM ADJUSTMENT UNDER 37 C.F.R. § 1.705(b)", filed June 24, 2005. Applicants request that the initial determination of patent term adjustment under 35 U.S.C. 154(b) be corrected from zero (0) days to six hundred forty-three (643) days.

The application for patent term adjustment is **DISMISSED**.

On March 30, 2005, the Office mailed the Determination of Patent Term Adjustment under 35 U.S.C. 154(b) in the above identified application. The Notice stated that the patent term adjustment (PTA) to date is zero (0) days. On June 24, 2005, Applicants



MM  
9/7/05  
K.S.  
9/7/05

timely<sup>1</sup> submitted an application for patent term adjustment, asserting that the correct number of days of PTA at the time of the mailing of the Notice of Allowance is six hundred forty-three (643) days.

The Office initially determined a patent term adjustment of zero (0) days based on an adjustment for PTO delay of six hundred forty-three (643) days, pursuant to 35 U.S.C. 154(b)(1)(A)(i) and 37 C.F.R. §1.703(a)(1), reduced by eight hundred thirty-five (835) days of Applicant delay pursuant to 37 C.F.R. § 1.704(c)(3).

A review of the record reveals that Applicants were properly assessed applicant delay pursuant to 37 C.F.R. § 1.704(c)(3). A Notice to File Missing Parts was mailed on October 16, 2001. Applicants failed to timely reply. Accordingly, the application became abandoned on December 17, 2001. A petition to revive was first filed on January 9, 2004, and was finally granted in a decision mailed on April 30, 2004.

Applicants state that the Office mailed a Withdrawal of Previously Sent Notice on July 29, 2004, indicating that the Notice of Abandonment mailed on November 10, 2003 was mailed in error. However, a review of the application file fails to reveal the presence of that paper. The application file is the official file of record. An applicant alleging the presence of a paper not contained therein bears the weight of that allegation by a preponderance of the evidence.

37 C.F.R. § 1.704(c)(3) states:

(c) Circumstances that constitute a failure of the applicant to engage in reasonable efforts to conclude processing or examination of an application also include the following circumstances, which will result in the following reduction of the period of adjustment set forth in § 1.703 to the extent that the periods are not overlapping:

(3) Abandonment of the application or late payment of the issue fee, in which case the period of adjustment set forth in §1.703 shall be reduced by the number of days, if any, beginning on the date of abandonment or the date after the date the issue fee was due and ending on the earlier of:

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<sup>1</sup> Applicant filed the application for patent term adjustment on the same date as the issue fee.

- (i) The date of mailing of the decision reviving the application or accepting late payment of the issue fee; or
- (ii) The date that is four months after the date the grantable petition to revive the application or accept late payment of the issue fee was filed; (emphasis added)

Therefore, Applicant should have been assessed delay for the period from December 17, 2001 (the date the application became abandoned) to April 30, 2004 (the date of mailing of the decision reviving the application), or 865 days, not 835 days.

In view thereof, the correct determination of patent term adjustment is zero (0) days (643 days of PTO delay, reduced by 865 days of applicant delay).

Receipt of the \$200 fee under 37 C.F.R. § 1.18(e) is acknowledged.

The application file is being forwarded to the Office of Patent Publication for timely issuance of the patent.

Telephone inquiries specific to this letter should be directed to Cliff Congo, Petitions Attorney, at (571)272-3207.

*Karin Ferriter*  
*for*

Karin Ferriter  
Senior Legal Advisor  
Office of Patent Legal Administration  
Office of Deputy Commissioner  
for Patent Examination Policy


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Atty. Dkt. No. 061300-0242

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

Applicants: O'Connell, et al.  
Title: ENVIRONMENTAL SHIELD  
FOR A TRUCK MOUNTED  
CONCRETE MIXER  
Appl. No.: 09/954,677  
Filing Date: 09/15/2001  
Examiner: Cooley, Charles E.  
Art Unit: 1723

<b>CERTIFICATE OF EXPRESS MAILING</b>	
I hereby certify that this correspondence is being deposited with the United States Postal Service's "Express Mail Post Office To Addressee" service under 37 C.F.R. § 1.10 on the date indicated below and is addressed to: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.	
EV 633080847 US (Express Mail Label Number)	June 24, 2005 (Date of Deposit)
Deborah A. Kocorowski (Printed Name)	
 (Signature)	

**APPLICATION FOR RECONSIDERATION OF PATENT TERM ADJUSTMENT  
UNDER 37 C.F.R. § 1.705(b)**

Mail Stop **PATENT EXT.**  
Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

Applicants hereby request reconsideration of the Patent Term Adjustment for the above-identified patent application.

- (1) Applicants have included the fee of \$200.00 as set forth in 37 C.F.R. § 1.18(e).
- (2) Applicants were issued a Notice of Allowance (NOA) on March 30, 2005, which indicated that the Patent Term Adjustment (PTA) for the above-identified patent application is 0 day(s). According to the Patent Application Information Retrieval (PAIR) System, the prosecution history of the above-identified patent application includes a 643 day USPTO delay and a 0 day Applicant delay (copy of PAIR PTA determination included herewith). Applicants request reconsideration of the PTA for the following reasons:





(i) Applicants believe that the correct PTA for the above-identified patent application is 643 days.

(ii) PTA Determination

(a) USPTO Delays

The PAIR System indicates that a 643-day USPTO delay is attributable to an erroneous Notice of Abandonment issued by the USPTO as described below and in the Declaration attached hereto.

(b) Applicant Delay

The PAIR System indicates an Applicant delay of 0 days.

The USPTO issued a Notice of Abandonment in error on November 10, 2003.

Applicants timely responded to the Notice of Abandonment by filing a Petition to Revive on January 9, 2004. The Petition was granted on April 30, 2004.

The USPTO issued a Withdrawal of Previously Sent Notice on July 29, 2004, indicating that the Notice of Abandonment mailed on November 10, 2003, was sent in error.

(c) PTA Calculation

As such, Applicants contend that the USPTO delay is 643 days and that the Applicant delay is 0 days. Therefore, the above-identified patent application is entitled to a 643 day PTA.

(iii) Terminal Disclaimer

The above-identified patent application is not subject to a terminal disclaimer.

(iv) **Circumstances That Constitute a Failure to Engage in Reasonable Efforts to Conclude Processing or Examination**

Applicants believe that there were no circumstances constituting a failure to engage in reasonable efforts to conclude processing or examination of the above-identified patent application as set forth in 37 C.F.R. § 1.704.

Should any questions arise with regard to this Application for Reconsideration of Patent Term Adjustment, please contact the undersigned.

Respectfully submitted,

Date 06-24-05

FOLEY & LARDNER LLP  
Customer Number: 26371  
Telephone: (414) 297-5776  
Facsimile: (414) 297-4900

By 

James A. Wilke  
Attorney for Applicants  
Registration No. 34,279

CLOSE WINDOW

ALL CASES

SELECT CASE

ACCOUNTS

## Patent Term Adjustment Calculation System

Add a new event to this case

Docket Number: 061300-0242

Application Number: 09/954677

Patent Number: N/A

	Event Description	Event Date	Days from Filing	PTO Days	Applicant Days
Edit Delete	Application Filing Date	09/15/2001	0		
	14 month From Application date	11/15/2002	426		
Edit Delete	Notice of Abandonment	11/10/2003	786		
Edit Delete	Petition to Revive Received at PTO	01/09/2004	846		
Edit Delete	Petition to Revive Received at PTO	04/15/2004	943		
Edit Delete	Petition to Revive App. Accepted	04/30/2004	958		
Edit Delete	Non-Final Office Action	08/19/2004	1,069		
Edit Delete	Non-Final Office Action Response Received at PTO	11/15/2004	1,157	643	
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Edit Delete	Non-Final Office Action Response Received at PTO	02/16/2005	1,250		
Edit Delete	Notice of Allowance	03/30/2005	1,292		
	Projected Patent Grant Date	10/11/2005	1,487		
			Totals:	643	0
			PTA:	643	

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**FOLEY**

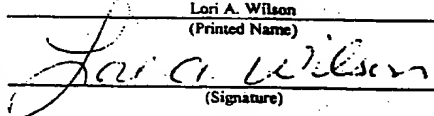
LOGIN: Andrew Mitchell

IP: 10.50.33.48

Foley &amp; Lardner LLP

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

Applicant: O'Connell, et al  
Title: ENVIRONMENTAL SHIELD  
FOR A TRUCK MOUNTED  
CONCRETE MIXER  
Appl. No.: 09/954,677  
Filing Date: 09/15/2001  
Examiner:  
Art Unit:

CERTIFICATE OF EXPRESS MAILING	
I hereby certify that this correspondence is being deposited with the United States Postal Service's "Express Mail Post Office To Addressee" service under 37 C.F.R. § 1.10 on the date indicated below and is addressed to: Commissioner for Patents, PO Box 1450, Alexandria, Virginia 22313-1450.	
EL 979073001 US (Express Mail Label Number)	1/9/04 (Date of Deposit)
Lori A. Wilson (Printed Name)	
 (Signature)	

**DECLARATION OF JAMES A. WILKE UNDER 37 C.F.R 1.137**

I, James A. Wilke declare:

1. I am an adult resident of the State of Wisconsin.
2. I am, and at all relevant times, an attorney for Oshkosh Truck Corporation, Oshkosh Wisconsin (OTC).
3. I filed a patent application now identified with Serial No. 09/954,677, a copy of a postcard bearing a U.S. Patent Office bar code sticker with the above serial number is attached hereto and incorporated herein by reference.
4. Prior to receipt of the Notice of Abandonment mailed November 10, 2003 and received in our Milwaukee Office on November 13, 2003, no communication from the U.S. Patent Office was received by the undersigned.
5. Upon information and belief, a Notice to File Missing Parts for Serial Number 09/954,677, was not received by our docketing department which receives and docket all correspondence from the U.S. Patent Office. A document dated November 13, 2003, entitled FL\_USPTO Form, bearing a Serial Number of 09/654,677 ( a copy of which is attached hereto) shows a misstatement of the serial number for our docket number.
6. The undersigned believes that the misstatement of numbers in the Serial Number caused the failure to reply to the Notice of Missing Parts. The undersigned believes

that the U.S. Patent Office mailed the Notice of Missing Parts to a correspondence address for serial number 09/654,677.

7. The undersigned conducted a telephone conversation with Mr. Preston Wallace of the U.S. Patent Office, on November 13, 2003 to explain and discuss this matter. Mr. Wallace suggested that a Petition to Revive be filed.

8. This declaration accompanies a copy of the Notice of Abandonment, the requisite revival fee, (\$1,330.00) a copy of the declaration and power of attorney of inventor Michael B. Cahoun, and the filing fee for the application (\$840.00).

9. I have been informed by a representative of Oshkosh Truck Corporation that named inventor, Jack Harowitz, after a diligent attempt to contact him, is not available at this time and that named inventor William J. O'Connell is refusing to sign any documents at this time. Neither of such inventors are employees of Oshkosh Truck Corporation.

10. I declare, under penalty of perjury under the laws of the United States of America, that the foregoing is true and correct. I make the statements set forth above of my own personal knowledge, and, if called upon to do so, could testify competently thereto. I acknowledge that willful false statements and the like are punishable by fine or imprisonment, or both (18 U.S.C. §1001) and may jeopardize the validity of the patent application and any corresponding patent.

Respectfully submitted,

Date

01-09-04

By



FOLEY & LARDNER  
777 East Wisconsin Avenue, Suite 3800  
Milwaukee, Wisconsin 53202-5306  
Telephone: (414) 297-5776  
Facsimile: (414) 297-4900

James A. Wilke  
Attorney for Applicant  
Registration No. 34,279



United States Patent and Trademark Office

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# PATENT APPLICATION INFORMATION RETRIEVAL



Printer Friendly Version

## Patent Term Adjustment (PTA) for application number: 09/954,677

			Days
Filing or 371(c) Date:	09-15-2001	USPTO Delay (PTO):	643
Issue Date of Patent:	-	Three Years:	-
Pre-Issue Petitions (days):	+0	Applicant Delay (APPL):	835
Post-Issue Petitions (days):	+0	Total PTA:	0
USPTO Adjustment (days):	-30	Explanation of Calculations	

Select Search Option

☐ Display References

☐ Search

☐ File History

☐ Image File Wrapper

☐ Publication Review

## Patent Term Adjustment History

Date	Contents Description	PTO (days)	APPL (days)
08-31-2005	Adjustment of PTA Calculation by PTO		
03-30-2005	Mail Notice of Allowance		
03-30-2005	Mail Formal Drawings Required		
03-21-2005	Issue Revision Completed		
03-21-2005	Formal Drawings Required		
03-21-2005	Notice of Allowance Data Verification Completed		
02-16-2005	Substitute Specification Filed		
03-13-2005	Date Forwarded to Examiner		
02-16-2005	Response after Ex Parte Quayle Action		
02-16-2005	Workflow incoming amendment IFW		
12-21-2004	Mail Ex Parte Quayle Action (PTOL - 326)		
12-20-2004	Ex Parte Quayle Action		
11-30-2004	Date Forwarded to Examiner		
11-15-2004	Response after Non-Final Action		
11-15-2004	Workflow incoming amendment IFW		
08-19-2004	Mail Non-Final Rejection	643	
08-18-2004	Non-Final Rejection	↑	
08-11-2004	Case Docketed to Examiner in GAU	↑	
07-28-2004	Application Dispatched from OIPE	↑	
07-29-2004	Application Is Now Complete	↑	
04-30-2004	Payment of additional filing fee/Preexam	↑	835
	A statement by one or more inventors satisfying		

EXHIBIT

C

04-30-2004	the requirement under 35 USC 115, Oath of the Applicant	↑	↑
11-10-2003	Withdraw Pre-Exam Abandon	↑	↑
04-30-2004	Petition to Revive Application - Granted	↑	↑
04-15-2004	Petition Entered	↑	↑
04-30-2004	Petition Decision - Granted	↑	↑
04-15-2004	Petition Entered	↑	↑
04-15-2004	Workflow incoming petition IFW	↑	↑
04-01-2004	Petition Decision - Dismissed	↑	↑
03-16-2004	Petition Entered	↑	↑
01-27-2004	Petition Decision - Dismissed	↑	↑
01-09-2004	Petition Entered	↑	↑
12-17-2001	Abandonment – During Preexam Processing	↑	↑
10-16-2001	Notice Mailed–Application Incomplete–Filing Date Assigned	↑	↑
10-16-2001	Correspondence Address Change	↑	
10-15-2001	Correspondence Address Change	↑	
09-24-2001	IFW Scan & PACR Auto Security Review	↑	
09-15-2001	Initial Exam Team nn	↑	

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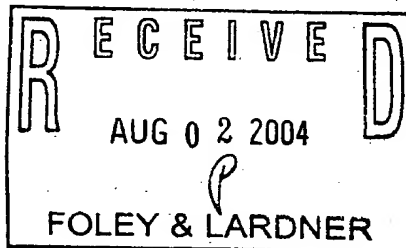


## UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE  
United States Patent and Trademark Office  
Address: COMMISSIONER FOR PATENTS  
P.O. Box 1450  
Alexandria, Virginia 22313-1450  
www.uspto.gov

APPLICATION NUMBER	FILING OR 371(c) DATE	FIRST NAMED APPLICANT	ATTY. DOCKET NO./TITLE
09/954,677		William J. O'Connell	061300-0242

James A. Wilke  
FOLEY & LARDNER  
Firststar Center  
777 East Wisconsin Avenue  
Milwaukee, WI 53202-5367



CONFIRMATION NO. 8436

## WITHDRAWAL NOTICE



\*OC000000013373193\*

Date Mailed: 07/29/2004

## WITHDRAWAL OF PREVIOUSLY SENT NOTICE

The Notice of Abandonment mailed on 11/10/2003 was sent in error and is hereby withdrawn. A Filing Receipt is enclosed. The Office regrets any inconvenience the error may have caused.



*A copy of this notice **MUST** be returned with the reply.*

*[Signature]*  
Customer Service Center

Initial Patent Examination Division (703) 308-1202

PART 1 - ATTORNEY/APPLICANT COPY



MM  
8/2/04



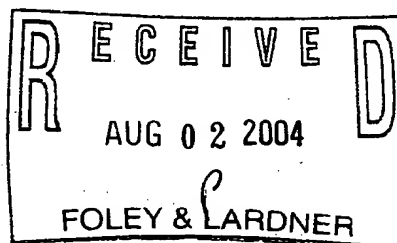


## UNITED STATES PATENT AND TRADEMARK OFFICE

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Alexandria, Virginia 22313-1450  
www.uspto.gov

APPL NO.	FILING OR 371 (c) DATE	ART UNIT	FIL FEE REC'D	ATTY. DOCKET NO	DRAWINGS	TOT CLMS	IND CLMS
09/954,677	09/15/2001	1723	770	061300-0242	4	20	3

James A. Wilke  
FOLEY & LARDNER  
Firstar Center  
777 East Wisconsin Avenue  
Milwaukee, WI 53202-5367



CONFIRMATION NO. 8436

UPDATED FILING RECEIPT



\*OC000000013373199\*

Date Mailed: 07/29/2004

Receipt is acknowledged of this regular Patent Application. It will be considered in its order and you will be notified as to the results of the examination. Be sure to provide the U.S. APPLICATION NUMBER, FILING DATE, NAME OF APPLICANT, and TITLE OF INVENTION when inquiring about this application. Fees transmitted by check or draft are subject to collection. Please verify the accuracy of the data presented on this receipt. If an error is noted on this Filing Receipt, please write to the Office of Initial Patent Examination's Filing Receipt Corrections, facsimile number 703-746-9195. Please provide a copy of this Filing Receipt with the changes noted thereon. If you received a "Notice to File Missing Parts" for this application, please submit any corrections to this Filing Receipt with your reply to the Notice. When the USPTO processes the reply to the Notice, the USPTO will generate another Filing Receipt incorporating the requested corrections (if appropriate).

**Applicant(s)**

William J. O'Connell, Frisco, TX;  
Michael B. Calhoun, Carrollton, TX;  
Jack Harowitz, Mesa, AZ;

**Domestic Priority data as claimed by applicant****Foreign Applications****If Required, Foreign Filing License Granted: 10/15/2001****Projected Publication Date: Request for Non-Publication Acknowledged****Non-Publication Request: Yes****Early Publication Request: No****Title**

Environmental shield for a truck mounted concrete mixer

**Preliminary Class**

MM  
8/2/04

---

**LICENSE FOR FOREIGN FILING UNDER  
Title 35, United States Code, Section 184  
Title 37, Code of Federal Regulations, 5.11 & 5.15**

**GRANTED**

The applicant has been granted a license under 35 U.S.C. 184, if the phrase "IF REQUIRED, FOREIGN FILING LICENSE GRANTED" followed by a date appears on this form. Such licenses are issued in all applications where the conditions for issuance of a license have been met, regardless of whether or not a license may be required as set forth in 37 CFR 5.15. The scope and limitations of this license are set forth in 37 CFR 5.15(a) unless an earlier license has been issued under 37 CFR 5.15(b). The license is subject to revocation upon written notification. The date indicated is the effective date of the license, unless an earlier license of similar scope has been granted under 37 CFR 5.13 or 5.14.

This license is to be retained by the licensee and may be used at any time on or after the effective date thereof unless it is revoked. This license is automatically transferred to any related applications(s) filed under 37 CFR 1.53(d). This license is not retroactive.

The grant of a license does not in any way lessen the responsibility of a licensee for the security of the subject matter as imposed by any Government contract or the provisions of existing laws relating to espionage and the national security or the export of technical data. Licensees should apprise themselves of current regulations especially with respect to certain countries, of other agencies, particularly the Office of Defense Trade Controls, Department of State (with respect to Arms, Munitions and Implements of War (22 CFR 121-128)); the Office of Export Administration, Department of Commerce (15 CFR 370.10 (j)); the Office of Foreign Assets Control, Department of Treasury (31 CFR Parts 500+) and the Department of Energy.

**NOT GRANTED**

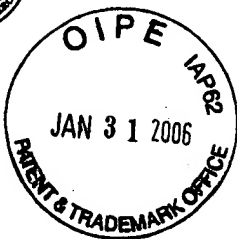
No license under 35 U.S.C. 184 has been granted at this time, if the phrase "IF REQUIRED, FOREIGN FILING LICENSE GRANTED" DOES NOT appear on this form. Applicant may still petition for a license under 37 CFR 5.12, if a license is desired before the expiration of 6 months from the filing date of the application. If 6 months has lapsed from the filing date of this application and the licensee has not received any indication of a secrecy order under 35 U.S.C. 181, the licensee may foreign file the application pursuant to 37 CFR 5.15(b).

JGM-JMLA

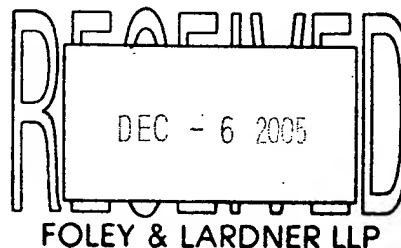


UNITED STATES PATENT AND TRADEMARK OFFICE

Commissioner for Patents  
United States Patent and Trademark Office  
P.O. Box 1450  
Alexandria, VA 22313-1450  
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FOLEY & LARDNER LLP  
777 EAST WISCONSIN AVE  
SUITE 3800  
MILWAUKEE WI 53202-5308



**COPY MAILED**

DEC 02 2005

**OFFICE OF PETITIONS**

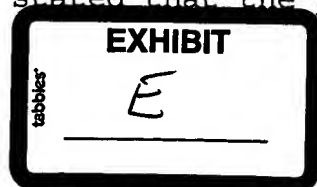
In re  
O'Connell, et al.  
Application No. 09/954,677  
Filed: September 15, 2001  
Patent No. 6,957,908  
Issued: October 25, 2005  
Attorney Docket No. 061300-0242

: DECISION ON APPLICATION  
: FOR PATENT TERM ADJUSTMENT

This letter is in response to the "REQUEST FOR RECONSIDERATION OF APPLICATION FOR RECONSIDERATION OF PATENT TERM ADJUSTMENT UNDER 37 C.F.R. § 1.705(b)", filed September 28, 2005. Applicants request that the patent term adjustment under 35 U.S.C. 154(b) be corrected from zero (0) days to six hundred forty-three (643) days.

The application for patent term adjustment is DISMISSED.

On March 30, 2005, the Office mailed the Determination of Patent Term Adjustment under 35 U.S.C. 154(b) in the above identified application. The Notice stated that the patent term adjustment



(PTA) to date is zero (0) days. On June 24, 2005, Applicants timely<sup>1</sup> submitted an application for patent term adjustment, asserting that the correct number of days of PTA at the time of the mailing of the Notice of Allowance is six hundred forty-three (643) days.

The Office initially determined a patent term adjustment of zero (0) days based on an adjustment for PTO delay of six hundred forty-three (643) days, pursuant to 35 U.S.C. 154(b)(1)(A)(i) and 37 C.F.R. §1.703(a)(1), reduced by eight hundred thirty-five (835) days of Applicant delay pursuant to 37 C.F.R. § 1.704(c)(3).

A Notice to File Missing Parts was mailed on October 16, 2001. Applicants failed to timely reply. Accordingly, the application became abandoned on December 17, 2001. A petition to revive was first filed on January 9, 2004, and was finally granted in a decision mailed on April 30, 2004.

In their application for patent term adjustment filed June 24, 2005, Applicants stated that the Office mailed a Withdrawal of Previously Sent Notice on July 29, 2004, indicating that the Notice of Abandonment mailed on November 10, 2003 was mailed in error. However, the application for patent term adjustment was dismissed in a decision mailed on September 1, 2005. The decision pointed out that a review of the application file failed to reveal the presence of a Withdrawal of Previously Sent Notice.

On renewed petition, applicants have supplied the Office with a copy of the July 29, 2004 Withdrawal of Previously Sent Notice. However, a further review of the record reveals that the Withdrawal of Previously Sent Notice was in fact mailed in error. The application was properly abandoned on December 17, 2001. The Notice to File Missing Parts mailed October 16, 2001 was properly mailed to the address of record (James A. Wilke, Foley & Lardner, Firststar Center, 777 East Wisconsin Avenue, Milwaukee, WI 53202-5367). A copy of the Notice is enclosed for petitioner's records.

Rather than file a petition to withdraw the holding of abandonment due to non-receipt of the Notice to File Missing Parts, applicants filed a petition to revive the application

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<sup>1</sup> Applicant filed the application for patent term adjustment on the same date as the issue fee.

under 37 C.F.R. § 1.137(b) on January 9, 2004.<sup>2</sup> The petition was granted in a decision mailed on April 30, 2004. The decision revived the application under 37 C.F.R. § 1.137(b); it did not *sua sponte* withdraw the holding of abandonment.

37 C.F.R. § 1.704(c)(3) states:

(c) Circumstances that constitute a failure of the applicant to engage in reasonable efforts to conclude processing or examination of an application also include the following circumstances, which will result in the following reduction of the period of adjustment set forth in § 1.703 to the extent that the periods are not overlapping:

(3) Abandonment of the application or late payment of the issue fee, in which case the period of adjustment set forth in § 1.703 shall be reduced by the number of days, if any, beginning on the date of abandonment or the date after the date the issue fee was due and ending on the earlier of:

(i) **The date of mailing of the decision reviving the application** or accepting late payment of the issue fee; or

(ii) The date that is four months after the date the grantable petition to revive the application or accept late payment of the issue fee was filed; (emphasis added)

Therefore, Applicant should have been assessed delay for the period from December 17, 2001 (the date the application became abandoned) to April 30, 2004 (the date of mailing of the decision reviving the application), or 865 days, not 835 days.

In view thereof, the correct determination of patent term adjustment is **zero (0) days** (643 days of PTO delay, reduced by 865 days of applicant delay).

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<sup>2</sup> A petition to revive an abandoned application should not be confused with a petition to withdraw the holding of abandonment. Where an applicant contends that the application is not in fact abandoned (e.g., there is disagreement as to the sufficiency of the reply, controlling dates, or applicant contends he did not receive an Office action), a petition under 37 CFR 1.181(a) requesting withdrawal of the holding of abandonment is the appropriate course of action, and such petition does not require a fee. Where there is no dispute as to whether an application is abandoned (e.g. the applicant's contentions merely involve the cause of abandonment), a petition under 37 CFR 1.137 is necessary to revive the abandoned application.

Telephone inquiries specific to this letter should be directed to Cliff Congo, Petitions Attorney, at (571)272-3207.

*Kery A. Fries*

Kery Fries  
Senior Legal Advisor  
Office of Patent Legal Administration  
Office of Deputy Commissioner  
for Patent Examination Policy

Enc: October 16, 2001 Notice to File Missing Parts (1 page)

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## UNITED STATES PATENT AND TRADEMARK OFFICE

COMMISSIONER FOR PATENTS  
UNITED STATES PATENT AND TRADEMARK OFFICE  
WASHINGTON, D.C. 20231  
www.uspto.gov

APPLICATION NUMBER	FILING/RECEIPT DATE	FIRST NAMED APPLICANT	ATTORNEY DOCKET NUMBER
09/954,677	09/15/2001	William J. O'Connell	061300-0242

CONFIRMATION NO. 8436

## FORMALITIES LETTER



\*OC00000006916125\*

James A. Wilke  
FOLEY & LARDNER  
Firstar Center  
777 East Wisconsin Avenue  
Milwaukee, WI 53202-5367

Date Mailed: 10/16/2001

## NOTICE TO FILE MISSING PARTS OF NONPROVISIONAL APPLICATION

FILED UNDER 37 CFR 1.53(b)

*Filing Date Granted*

An application number and filing date have been accorded to this application. The item(s) indicated below, however, are missing. Applicant is given **TWO MONTHS** from the date of this Notice within which to file all required items and pay any fees required below to avoid abandonment. Extensions of time may be obtained by filing a petition accompanied by the extension fee under the provisions of 37 CFR 1.136(a).

- The statutory basic filing fee is missing.  
*Applicant must submit \$ 710 to complete the basic filing fee for a non-small entity. If appropriate, applicant may make a written assertion of entitlement to small entity status and pay the small entity filing fee (37 CFR 1.27).*
- The oath or declaration is missing.  
*A properly signed oath or declaration in compliance with 37 CFR 1.63, identifying the application by the above Application Number and Filing Date, is required.*
- To avoid abandonment, a late filing fee or oath or declaration surcharge as set forth in 37 CFR 1.16(l) of \$130 for a non-small entity, must be submitted with the missing items identified in this letter.
- The balance due by applicant is \$ 840.

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*A copy of this notice **MUST** be returned with the reply.*




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Customer Service Center  
Initial Patent Examination Division (703) 308-1202

PART 3 - OFFICE COPY



Atty. Dkt. No. 061300-0242

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

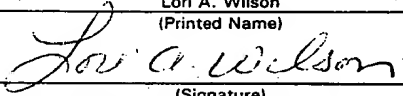
Applicant: O'Connell, et al  
Title: ENVIRONMENTAL SHIELD  
FOR A TRUCK MOUNTED  
CONCRETE MIXER

Appl. No.: 09/954,677

Filing Date: 09/15/2001

Examiner:

Art Unit:

<b>CERTIFICATE OF EXPRESS MAILING</b>	
I hereby certify that this correspondence is being deposited with the United States Postal Service's "Express Mail Post Office To Addressee" service under 37 C.F.R. § 1.10 on the date indicated below and is addressed to: Commissioner for Patents, PO Box 1450, Alexandria, Virginia 22313-1450.	
EL 979073001 US	1/9/04
(Express Mail Label Number)	(Date of Deposit)
Lori A. Wilson (Printed Name)	
 (Signature)	

**PETITION FOR REVIVAL OF APPLICATION FOR PATENT  
ABANDONED UNINTENTIONALLY UNDER 37 C.F.R. § 1.137(b)**

Mail Stop Petition  
Commissioner for Patents  
PO Box 1450  
Alexandria, Virginia 22313-1450

Sir:

The above-identified application became abandoned for failure to file a timely and proper response to the Notice of Missing Parts, which set a three-month period for response.

APPLICANT HEREBY PETITIONS FOR REVIVAL OF THIS APPLICATION

NOTE: A grantable petition requires the following items:

- (1) Required reply and/or fee;
  - (2) Petition fee (37 C.F.R. § 1.17(m));
  - (3) Statement that the abandonment was unintentional; and
  - (4) Any required terminal disclaimer (37 C.F.R. § 1.137(c)).
- (1) Required reply and/or fee.

The proposed reply and required fee for the above-noted Notice of Missing Parts in the form of a Declaration and Power of Attorney and Filing Fee is enclosed herewith.





(2) Petition fee (37 C.F.R. § 1.17(m))

A check in the amount of \$1,330.00 is enclosed for the amount stated in 37 C.F.R. § 1.17(m) to cover the fee for this petition.

The Commissioner is hereby authorized to charge any additional fees which may be required regarding this application under 37 C.F.R. §§ 1.16-1.17, or credit any overpayment, to Deposit Account No. 06-1447. Should no proper payment be enclosed herewith, as by a check being in the wrong amount, unsigned, post-dated, otherwise improper or informal or even entirely missing, the Commissioner is authorized to charge the unpaid amount to Deposit Account No. 06-1447.

(3) Statement that the abandonment was unintentional.

Applicant hereby states that the entire delay in filing the required reply, from the due date for the reply until the filing of this petition, was unintentional. See attached Declaration of the undersigned.

(4) Any required terminal disclaimer (37 C.F.R. § 1.137(c)).

No terminal disclaimer is required in this application under 37 C.F.R. § 1.137(c) since this application was not filed before June 8, 1995.

Respectfully submitted,

Date 01-09-04

FOLEY & LARDNER  
777 East Wisconsin Avenue, Suite 3800  
Milwaukee, Wisconsin 53202-5306  
Telephone: (414) 297-5776  
Facsimile: (414) 297-4900

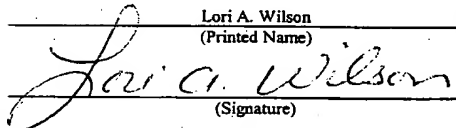
By



James A. Wilke  
Attorney for Applicant  
Registration No. 34,279

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

Applicant: O'Connell, et al  
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CONCRETE MIXER  
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Filing Date: 09/15/2001  
Examiner:  
Art Unit:

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EL 979073001 US (Express Mail Label Number)	1/9/04 (Date of Deposit)
Lori A. Wilson (Printed Name)	
 (Signature)	

**DECLARATION OF JAMES A. WILKE UNDER 37 C.F.R 1.137**

I, James A. Wilke declare:

1. I am an adult resident of the State of Wisconsin.
2. I am, and at all relevant times, an attorney for Oshkosh Truck Corporation, Oshkosh Wisconsin (OTC).
3. I filed a patent application now identified with Serial No. 09/954,677, a copy of a postcard bearing a U.S. Patent Office bar code sticker with the above serial number is attached hereto and incorporated herein by reference.
4. Prior to receipt of the Notice of Abandonment mailed November 10, 2003 and received in our Milwaukee Office on November 13, 2003, no communication from the U.S. Patent Office was received by the undersigned.
5. Upon information and belief, a Notice to File Missing Parts for Serial Number 09/954,677, was not received by our docketing department which receives and docketes all correspondence from the U.S. Patent Office. A document dated November 13, 2003, entitled FL\_USPTO Form, bearing a Serial Number of 09/654,677 ( a copy of which is attached hereto) shows a misstatement of the serial number for our docket number.
6. The undersigned believes that the misstatement of numbers in the Serial Number caused the failure to reply to the Notice of Missing Parts. The undersigned believes

that the U.S. Patent Office mailed the Notice of Missing Parts to a correspondence address for serial number 09/654,677.

7. The undersigned conducted a telephone conversation with Mr. Preston Wallace of the U.S. Patent Office, on November 13, 2003 to explain and discuss this matter. Mr. Wallace suggested that a Petition to Revive be filed.

8. This declaration accompanies a copy of the Notice of Abandonment, the requisite revival fee, (\$1,330.00) a copy of the declaration and power of attorney of inventor Michael B. Cahoun, and the filing fee for the application (\$840.00).

9. I have been informed by a representative of Oshkosh Truck Corporation that named inventor, Jack Harowitz, after a diligent attempt to contact him, is not available at this time and that named inventor William J. O'Connell is refusing to sign any documents at this time. Neither of such inventors are employees of Oshkosh Truck Corporation.

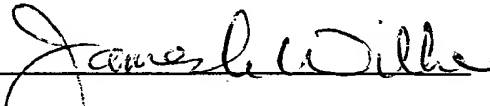
10. I declare, under penalty of perjury under the laws of the United States of America, that the foregoing is true and correct. I make the statements set forth above of my own personal knowledge, and, if called upon to do so, could testify competently thereto. I acknowledge that willful false statements and the like are punishable by fine or imprisonment, or both (18 U.S.C. §1001) and may jeopardize the validity of the patent application and any corresponding patent.

Respectfully submitted,

Date 01-09-04

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777 East Wisconsin Avenue, Suite 3800  
Milwaukee, Wisconsin 53202-5306  
Telephone: (414) 297-5776  
Facsimile: (414) 297-4900

By

  
James A. Wilke  
Attorney for Applicant  
Registration No. 34,279

Received:	Delivered:	Pat/TM	Docket No:	App/Reg No:	Action:
10/19/200 1		Pat	061300-0242	09/654,677	Notice to File Missing Parts of Nonprovisional Application

09/ 954607

Inventor/Mark:	Atty:	Office
O'Connell	JAWI	Milwaukee